Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

Supreme Court Of The United States

ODESSA MCCALL, GUARDIAN OF THE ESTATE OF JOSEPH BESS, JR., AN INCOMPETENT MINOR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

JOHN WOMICK
WOMICK LAW FIRM, CHTD.
1100 WEST MAIN
P.O. BOX 1355
CARBONDALE, IL 62903
(618) 529-2440

Attorney for Petitioner

27pp

QUESTION PRESENTED FOR REVIEW

Whether the administrative statute of limitations under the Federal Tort Claims Act is tolled during the mental incapacity of a minor, whose mental incapacity has been caused by the government, where the minor resides in a jurisdiction where there is no enforceable duty upon the minor's parent to bring suit under the Act within the prescribed limitations period.

PARTIES OF THE CASE

Petitioner - Odessa McCall, Guardian of the case of Joseph Bess, Jr., and incompetent minor

Respondent - United States of America

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Regan, D.J.) granted respondent's motion to dismiss (Appendix(A1)). The court of appeals' opinion (per Ripple, C.J., joined by Coffey and Kanne, J.J.) affirming (Appendix (A2)) is published at 310 F.3d 984.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order on November 13, 2002. Petitioner invokes this Court's jurisdiction under 28 U.S.C. Section 1254 (1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 1346(b)(1):

Subject to the provisions of Chapter 171 of this Title, the District Courts, together with the United States District Court for the District of the Canal Zone and the District of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of

the place where the act or omission occurred.

28 U.S.C. Section 2401(b):

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within 2 years after such claim accrues or unless action is begun within 6 months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

STATEMENT OF THE CASE

This case arises from a claim of medical malpractice which occurred on September 25, 1995. Nichole McCall presented herself at about 4:00 a.m. on September 25, 1995 to Centreville Township Hospital, Centreville, Illinois, in active labor. At about 8:30 a.m. on the same day, Nichole McCall gave birth to Joseph Bess, Jr. without a nurse or doctor in attendance. Joseph Bess, Jr. suffered permanent and irreparable brain damage, rendering him mentally incompetent. On May 11, 1999, an administrative claim was filed with the appropriate federal agency claiming damages to Joseph Bess, Jr. due to negligent medical treatment during the labor and delivery. The Appellant, Odessa McCall, as Guardian of the Estate of Joseph Bess, Jr., an Incompetent Minor and Nichole McCall, individually filed a complaint in the United States District Court for the Southern District of Illinois against Centreville Township Hospital d/b/a Touchette Regional Hospital; Southern Illinois Healthcare Foundation, Inc.; P. Brissette; N.

Hirsch; Emeka Ekwulugo, M.D.; Darrell Ballinger, M.D.; and the United States of America on September 21, 2000. Federal court jurisdiction was based upon a federal question pursuant to 28 U.S.C. § 1331, specifically the Federal Tort Claims Act, 28 U.S.C.§ 1346(b). The Plaintiff claimed that the acts on the part of the Defendant, United States of America, through its doctors, and on the part of Centreville Township Hospital, through its nurses, were negligent and that negligence contributed to cause the problems from which the minor child still suffers. Plaintiff Nichole McCall was voluntarily dismissed out of the case. Pursuant to 28 U.S.C. § 233, the United States of America was substituted for Emeka Ekwulugo, M.D.; Darrell Ballinger, M.D.; and Southern Illinois Healthcare Foundation, Inc. by Court Order entered February 9, 2001. On February 11, 2002, the United States District Court for the Southern District of Illinois granted Defendant United States of America's Motion to Dismiss based on lack of subject matter jurisdiction reasoning that the jurisdictional statute of limitations had passed.

By Court Order dated March 14, 2002, the District Court declined to exercise supplemental jurisdiction and dismissed all the remaining claims without prejudice. On April 10, 2002, the Appellant Odessa McCall, as Guardian of the Estate of Joseph Bess, Jr, an Incompetent Minor timely filed a Notice of Appeal.

The appeal was heard by the United States Circuit Court

for the Seventh Circuit. In its opinion and order of November 13, 2002, the Court of Appeals affirmed the District Court's dismissal for lack of subject matter jurisdiction. This Petition for Writ of Certiorari followed.

REASONS WHY WRIT SHOULD BE GRANTED

This Court should grant Petitioner's Writ of Certiorari because this case presents an important question of federal law which the Court has not addressed. Since this Court's decision in *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352 (1979), the circuit courts have struggled with the application of the discovery rule in Federal Tort Claims Act (FTCA) cases where the government's conduct has caused the mental incapacity of an emancipated adult. *Clifford by Clifford v. United States*, 738 F.2d 977, 980 (8th Cir. 1985); *Zeidler v. United States*, 601 F.2d 527, 531 (10th Cir. 1979); *Barren by Barren v. United States*, 839 F.2d 987, 991-92 (3rd Cir. 1988). On the other hand, the circuit courts have not addressed the applicability of the discovery rule to a mentally incompetent minor. Instead, courts faced with this issue have simply assumed that a minor's parent is an adequate surrogate for the minor in all cases. *See Crawford v. United States*, 796 F.2d 924, 927 (7th Cir. 1986). Consequently, the courts have continued to apply a blanket rule which disallows the tolling of the FTCA Statute of Limitations during a plaintiff's minority. *See MacMillan v. United States*, 46 F.3d 377, 381 (5th Cir. 1995); *Zavala by Ruiz v. United States*, 876 F.2d 780, 783-84

(9th Cir. 1989); *Leonhard v. United States*, 633 F.2d 599, 624 (2nd Cir. 1980); *Robbins v. United States*, 624 F.2d 971, 972 (10th Cir. 1980).

While assuming that a parent is an adequate surrogate for a minor, the courts have not addressed the distinction between the legally enforceable duties assigned to parents in the various states. For example, in Illinois, the Doctrine of Parent-Child Immunity prevents minors from filing suit against their parents stating claims related to matters arising within the scope of the parent-child relationship. *Cates v. Cates*, 156 Ill.2d 76, 619 N.E.2d 715, 729 (1993) (Whether the "alleged conduct concerns parental discretion and discipline, supervision and care of the child"). Parents in California, on the other hand, are subject to suit under a "reasonable parent" standard. *Gibson v. Gibson*, 3 Cal.3d 914, 479 P.2d 648 (1971). Rather than addressing jurisdictional differences impacting parental duties, the courts have based their reasoning on the presumption that a parent has a legal duty to file suit on behalf of a child. This presumption ignores potential state law to the contrary where the child resides.

Here, contrary to the presumption of the circuit court below, Joseph Bess, Jr. did not have an adequate surrogate charged with any legal or enforceable duty to bring his claim. To assert that his claim accrued under such circumstances amounts to charging Joseph with the *personal* knowledge that he had a claim, and entrusting him with the responsibility to

bring said claim, at a time when he was not legally competent to do so. While this result may seem consistent with longstanding federal case law, it contradicts the reasoning employed by those same courts considering this issue. More importantly, the manner in which the circuit courts have applied the law has, and will continue to, unfairly prejudice children such as Joseph who have no adequate representative. There is nc reason why children in Joseph's position, who have been rendered mentally incapacitated by acts of the government, should be treated any differently than emancipated adults in the same position. Thus, this court should grant Petitioner's writ in order to correct the inequity and inconsistency in the current application of the law.

I. Courts have correctly applied the discovery rule in cases where the government has caused the mental incapacity of the emancipated adult

In 1979, this Court enunciated the correct application of the discovery rule in cases arising under the FTCA. *Kubrick*, 444 U.S. at 122, 100 S.Ct. at 359. This Court has held that the claims accrue at the time a plaintiff is in possession of the critical facts that he or she has been hurt and who has inflicted the injury. *Id.* In recognition of this ruling, some circuit courts have ruled that the proper application of the discovery rule necessitates that the administrative statute of limitations should be "tolled" in limited circumstances. *See Clifford, Zeidler, but cf. Barren*. Notably, in applying the discovery rule, neither the

Clifford nor the *Zeidler* courts actually relied on the Doctrine of Equitable Tolling. Rather, the results reached in those cases simply involved the correct application of the discovery rule as enunciated in *Kubrick*. Simply put, the claim of a mentally incompetent adult cannot accrue until such time as that person is adequately represented by a guardian. *Clifford*, 738 F.2d at 980. On the other hand, the *Clifford* court did recognize the distinction between cases where a plaintiff had a pre-existing mental condition and those in which mental incompetence was brought on by the government's negligence. *Id.* at 980. This distinction highlights the fact that equity demands consideration of the government's conduct when examining statutes of limitations in general. As in *Clifford*, the same equitable considerations should be given their due weight here. Moreover, equitable treatment demands that the same considerations given to adults under the discovery rule be given to children.

II. Courts have correctly recognized the need for an adequate representative, with a legal duty to file suit on behalf of a plaintiff, as a precursor to the accrual of a claim.

As Circuit Judge Posner articulated in *Crawford v. United States*, 796 F.2d 924, 927 (7th Cir. 1986), "cases that hold that infancy does not toll the administrative statute of limitations implied that a parent is an adequate surrogate." *See also Zavala*, 876 F.2d at 783-84 ("When the suit is one for medical malpractice under the FTCA, we toll the statute only where the injured party has no one with a legal duty to file suit on his

behalf."); *MacMillan*, 46 F.3d at 381 (citing Zavala). Not all courts, however, have acknowledged the need for this analytical step. Some have simply relied on the so called "firmly established principle" that the statute of limitations is not tolled during a plaintiff's minority. See *Robbins*, 624 F.2d at 972 (citing *Smith v. United States*, 588 F.2d 1209 (8th Cir. 1978); *Pitman v. United States*, 341 F.2d 739 (9th Cir.) cert denied 382 U.S. 941, 886 S.Ct. 394 (1965); *United States v. Glenn*, 231 F.2d 884 (9th Cir.) cert denied 352 U.S. 926, 77 S.Ct. 223 (1956)) & *Leonhard*, 633 F.2d at 624 (citing *Smith*, *Glen*, and *Simon v. United States*, 244 F.2d 703 (5th Cir. 1957)). The problem with the reasoning of the *Leonhard* and *Robbins* courts, and decisions upon which they relied, is that they do not take into account the discovery rule articulated by this court in *Kubrick*. While many of these cases predate *Kubrick*, the correct application of the discovery rule clearly requires the existence of an adequate surrogate to discover, and act upon, facts constituting a claim against the government.

While the *Zavala*, *MacMillan* and *Crawford* courts correctly acknowledge this need, their reasoning falls short in their presumption that all children have adequate representatives in their parents. This is simply not the case. Courts must conduct a deeper analysis. Children in some states may have adequate representation through their parents but this is not true for all children in all states. The circuit court below was asked to consider this point (Petitioner's brief on Appeal to the Seventh

Circuit at 10-11) but chose not to do so. The Petitioner respectfully requests that this court provide guidance to the circuits in granting this Writ.

III. Children in Illinois do not have adequate parental representation to be charged with prosecuting their claims against the government.

Unlike some of our sister states, Illinois has only partially abrogated the Doctrine of Parent Child Immunity. *Cates*, 619 N.E.2d at 729. Some jurisdictions have followed the lead of California and fully eliminated the Doctrine in favor of particular standards applicable to parents. *See Gibson v. Gibson*, 3 Cal.3d 914, 479 P.2d 648 (1971). Interestingly, California, the state where the *Zavala* case originated, has adopted a reasonable parent standard. *Gibson*, 479 P.2d at 653. Such a standard allows a child to sue to enforce the duties legally owed to a child by the child's parents.

In jurisdictions such as a California, therefore, it is reasonable to bind a child by the acts of the parents. If the parents fail to act in a reasonable manner in prosecuting the minor's claim, the minor may still seek relief against the parents for that failure to act. The same cannot be said for children in states such as Illinois where parent-child immunity has not been completely abrogated. In Illinois, parents are still shielded from suit for conduct constituting an exercise of parental authority, supervision over the child, or the exercise of discretion in provision of care to the child. *Cates*, 619 N.E.2d at 729.

Bringing suit on behalf of one's child, which arises wholly out of the parent-child relationship, would clearly fall within this umbrella. Consequently, the presumption regarding the adequacy of parents as surrogates for children who have a claim against the government fail to withstand scrutiny and must be modified. Petitioner requests that this Court grant her Writ so that this issue may be fully and completely addressed.

CONCLUSION

Wherefore the Petitioner requests that this Court grant her Petition for Writ of Certiorari and hear this case due to the compelling issues presented which this Court has not ruled upon.

Respectfully Submitted,

JOHN WOMICK
Womick Law Firm, Chtd.
1100 West Main
P.O. Box 1355
Carbondale, IL 62903
(618) 529-2440

APPENDIX

A1

FEB 13 Jd2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

FILED
FEB 11 2002
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS OFFICE

McCall et al
Plaintiff

vs.

NO. 00-740-MJR

Centreville Township Hospital et al
Defendant

- ORDER

Defendant United States of America's Motion to Dismiss (Doc # 57) based upon lack of subject matter jurisdiction is granted for the reasons thoroughly stated on the record.

Plaintiffs motion for a finding under, 28 USC Sec 1292 (b) that the court's order involves a controlling issue of law to which there is substantial ground for difference of opinion, is denied.

Parties to file legal memoranda within 14 days as to the status of the court's jurisdiction now that the Federal Tort Claims Action has been dismissed.

Date 2/11/02

/s/ Michael J. Reagan
United States District Judge

In the
United States Court of Appeals
For the Seventh Circuit

No. 02-1889

ODESSA MCCALL, Guardian of the Estate
of JOSEPH BESS, JR., an Incompetent Minor,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 00 C 740—**Michael J. Reagan**, *Judge.*

ARGUED OCTOBER 1, 2002—DECIDED NOVEMBER 13, 2002

Before COFFEY, RIPPLE and KANNE, *Circuit Judges.*

RIPPLE, *Circuit Judge.* Odessa McCall, as guardian of the estate of Joseph Bess, Jr., brought this action against the United States pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2674. Ms. McCall alleged that government doctors provided negligent treatment during the birth of her grandson, who was born with serious medical problems including mental incompetency. The district court dismissed her complaint, concluding that the suit was time-barred. On appeal, Ms. McCall submits that the FTCA's administrative statute of limitations should have been tolled

because Joseph is incompetent—a condition brought about by the Government's own negligence. Because the FTCA's statute of limitations is not tolled during the minority of the putative plaintiff, we affirm the judgment of the district court.

I

BACKGROUND

A. Facts

1. Joseph's Birth

Early in the morning of September 25, 1995, Nichole McCall arrived in active labor at the Touchette Regional Hospital in Centreville, Illinois. Hospital personnel placed her in a labor room. Around 5 a.m., hospital personnel told Ms. McCall that her baby was "in distress."

Around 8:30 a.m., nurses told Ms. McCall that delivery was still some time away. Ms. McCall responded, however, that she believed delivery was imminent. For unexplained reasons, the nurses left her room at that point. Before any doctors or nurses returned, she gave birth to Joseph Bess, Jr. Dr. D. Ballinger and Dr. E. Ekwulugo, both employed by the United States through the National Health Service, had provided prenatal care to Ms. McCall. Although Dr. Ballinger was on his way to the hospital and Dr. Ekwulugo was working in the hospital that morning, neither of these doctors treated her until after Joseph was born.

When the nurses returned to Ms. McCall's room and discovered Joseph's birth, they saw that he was blue and was having trouble breathing. The nurses performed chest compressions and suctioning on Joseph, but, despite these attempts, he began experiencing seizures. Consequently, medical personnel transferred Joseph by helicopter to Children's Hospital in St. Louis, Missouri.

Joseph spent seventeen days in neonatal intensive care at Children's Hospital. During his stay, medical personnel there told Ms. McCall that the umbilical cord had wrapped around Joseph's neck during his birth and that he had been permanently brain-damaged.

2. Early Litigation

Within six months of Joseph's birth, Ms. McCall consulted with a medical malpractice attorney about the problems during delivery. Soon thereafter, at some unspecified date in 1996, she sued Touchette Regional Hospital and various nurses in Illinois state court. For reasons not reflected in the record, Ms. McCall voluntarily dismissed this suit.

In 1999, Ms. McCall filed an administrative claim with the Department of Health and Human Services. She alleged that government doctors acted negligently during her labor and delivery of Joseph. The Department of Health and Human Services did not take any action on this claim.

B. District Court Proceedings

In September 2000, Nichole McCall and Odessa McCall, the grandmother and guardian of the estate of Joseph Bess, Jr.,[1] brought this federal action against the hospital, two nurses, Dr. Ekwulugo, Dr. Ballinger, and the United States for medical malpractice. The McCalls based jurisdiction on the FTCA, 28 U.S.C. § 1346(b)(1). They alleged that the defendants negligently caused Joseph's injuries, including mental incompetency. For reasons not reflected in the record, Ms. McCall voluntarily dismissed herself from the suit. The United States substituted itself for the two doctors.

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[1] The record does not indicate when Odessa McCall was appointed as Joseph's guardian.

The United States moved to dismiss the action for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). The Government argued that the FTCA's two-year administrative statute of limitations, 28 U.S.C. § 2401(b), barred Odessa McCall's suit because no one had filed an administrative claim in the case until almost four years after Joseph's injuries occurred. The district court granted the dismissal on the ground that the limitations period had passed. It concluded that, regardless of Joseph's incompetency, the FTCA's statute of limitations is not tolled for infants. The district court declined to exercise supplemental jurisdiction over Odessa McCall's remaining claims.

II

DISCUSSION

Ms. McCall asks us to hold that a minor's mental incompetency, allegedly caused by the defendant, the United States, tolls the FTCA's administrative statute of limitations. Because the FTCA's statute of limitations is not tolled during the minority of a putative plaintiff, we decline to do so.

We review the district court's dismissal for lack of subject matter jurisdiction de novo. *See City of Beloit v. Local 643 of American Federation of State, County & Municipal Employees*, 248 F.3d 650, 652 (7th Cir. 2001). The FTCA exposes the United States to tort liability "in the same manner and to the same extent as a private individual . . . ." 28 U.S.C. § 2674. The FTCA has a two-year administrative statute of limitations: "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . . ." 28 U.S.C. § 2401(b). Federal law governs when claims accrue under the FTCA. *Jastremski v. United States*, 737 F.2d 666, 669 (7th Cir. 1984).

Although the statute of limitations is an affirmative defense, Ms. McCall, as the plaintiff, has the burden of establishing an exception to the statute. *See Weger v. Shell Oil Co.*, 966 F.2d 216, 218 (7th Cir. 1992). Therefore, Ms. McCall must show that Joseph's claim accrued less than two years before presentation of the administrative claim, unless some form of tolling applies. Ms. McCall argues that tolling applies in this case because courts generally toll the FTCA's statute of limitations when the Government causes mental incompetence in the plaintiff. *See Clifford by Clifford v. United States*, 738 F.2d 977, 980 (8th Cir. 1984); *Zeidler v. United States*, 601 F.2d 527, 531 (10th Cir. 1979). *But cf. Barren by Barren v. United States*, 839 F.2d 987, 991-92 (3d Cir. 1988).

Although Ms. McCall focuses on the nature and cause of Joseph's injury, Joseph's status as a minor is the controlling factor in the tolling analysis. The nature of the injury, even a cognitive one such as mental incompetence, is not relevant when the putative plaintiff is a minor. *See Barnhart v. United States*, 884 F.2d 295, 299 (7th Cir. 1989) ("Where the plaintiff was a minor whose parents had a duty to take the initiative in instituting a legal action, or where a plaintiff has an appointed guardian with a similar duty, the plaintiff's incapacity would not appear to be similarly critical."); *Crawford v. United States*, 796 F.2d 924, 927 (7th Cir. 1986) ("[W]e note that if Crawford had been a minor when the accident occurred . . . his lack of mental capacity would be irrelevant."). Therefore, the main thrust of the appeal is whether the statute of limitations can be tolled even though Joseph is a minor.

Our sister circuits have established the general rule that the FTCA's statute of limitations is not tolled during the period of a putative plaintiff's minority. *See MacMillan v. United States*, 46 F.3d 377, 381 (5th Cir. 1995) ("[U]nder the FTCA, the limitations period is not tolled during the minority of the putative plaintiff; rather 'his parent's

knowledge of the injuries is imputed to him.'"); *Zavala by Ruiz v. United States*, 876 F.2d 780, 783-84 (9th Cir. 1989) (holding that it would not toll the FTCA's statute of limitations because the minor's parent had a duty to act on the minor's behalf); *Clifford*, 738 F.2d at 980 (noting the "well-recognized" rule that the FTCA's statute of limitations is "not ordinarily tolled for infancy"); *Leonhard v. United States*, 633 F.2d 599, 624 (2d Cir. 1980) ("It is firmly established that the two-year [FTCA's statute of limitations] period is not tolled by the claimant's minority."); *Robbins v. United States*, 624 F.2d 971, 972 (10th Cir. 1980) ("It is well established, however, that a claimant's minority does not toll the running of the [FTCA's] statute of limitations.").

Although we have never expressly decided the question, strong language in several of our opinions concurs that the FTCA's statute of limitations is not tolled during the period of minority. *See Barnhart*, 884 F.2d at 299 (noting that the FTCA's statute of limitations would not be tolled "[w]here the plaintiff was a minor whose parents had a duty to take the initiative in instituting a legal action"); *Crawford*, 796 F.2d at 927 (recognizing that "[t]he cases that hold that infancy does not toll the administrative statute of limitations imply that a parent is an adequate surrogate"); *Swietlik v. United States*, 779 F.2d 1306, 1308 (7th Cir. 1985) (noting the "long line of cases under the Federal Tort Claims Act hold[ing] that the statute of limitations in that Act is not tolled by infancy"); *Jastremski*, 737 F.2d at 669 ("The parents or guardian of a minor must bring the minor's claim in a timely fashion because the child's minority does not toll the running of the federal tort claims statute of limitations.").

Ms. McCall challenges this rule on policy grounds, arguing that it would be unfair to apply the rule if the minor's parents did not have a duty to sue on their child's behalf. Courts, however, are not free to construe the FTCA's statute of limitations broadly. As the Supreme Court made

clear in *United States v. Kubrick*, 444 U.S. 111, 117 (1979), courts must not construe the FTCA's limitation provisions "so as to defeat [their] obvious purpose, which is to encourage the prompt presentation of claims." Additionally, because the FTCA waives the immunity of the United States and its statute of limitations is a condition of that waiver, courts should not "extend the waiver beyond that which Congress intended." *Id.* at 117-18. This conclusion is strengthened when examined against the background of a proposed amendment in 1989 to the FTCA. In that amendment, Congress considered creating a tolling exception for minors under the FTCA's statute of limitations, but ultimately, the amendment did not make it out of committee.[2]

Therefore, we now join our sister circuits and hold that the FTCA's statute of limitations is not tolled during the period of a putative plaintiff's minority. We refrain from deciding, however, whether our analysis would be the same if the record affirmatively reflected that the parents had an interest adverse to or that the custodial adult could not be expected to make legal decisions in the best interests of the child. There is no evidence here that the McCalls' interests

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[2] The proposed amendment would have tolled the FTCA's statute of limitations until putative plaintiffs turned 18:

> That section 2401(b) of title 28, United States Code, is amended—
>
> (1) by striking out 'A' and inserting in lieu thereof 'Except as provided in the second sentence of this subsection, a'; and
>
> (2) by adding at the end thereof the following: 'A tort claim against the United States of any person who is under the age of 18 years at the time the claim accrues may be presented to the appropriate Federal agency not later than two years after such person reaches the age of 18 years.'

H. R. 3260, 101st Cong. (1989).

conflicted with Joseph's interests. To the contrary, within six months of Joseph's tragic birth, his mother consulted with an attorney about obtaining legal relief, and the McCalls subsequently filed two lawsuits and an administrative claim. Thus, we leave open the question whether the FTCA's statute of limitations would be tolled if a minor lacked adequate means of obtaining judicial relief through either his parents or a guardian.

As a final argument, Ms. McCall asserts that Joseph's due process and equal protection rights are violated when courts toll the FTCA's statute of limitations for adults—but not minors—whom the Government has rendered incompetent. We are not persuaded, however, that these claims rise to constitutional proportion. *See Zavala*, 876 F.2d at 784; *Landreth by Ore v. United States*, 850 F.2d 532, 535 (9th Cir. 1988).

Conclusion

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit